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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a-not-for-profit corporation, and LARRY KATZENSTEIN and JOYCE ARMSTRONG, as representatives of the AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Petitioners,

VS.

B. STEPHEN MILLER, III,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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1. The Importance of the Decision Below[1]

No non-profit sponsor of litigation, regardless of its structure and point of view, regardless of whether its lawyers are volun-

[1] The opinion of the Supreme Court of Missouri is now reported at 803 S.W.2d 592.

teers or on staff, may ever accept a prevailing party's assignment of § 1988 fees under the decision below. None.

This, and nothing narrower, is what the Missouri Supreme Court held.

The court below has taken a fee-sharing ethics rule, originally adopted by the American Bar Association in 1908, and a state statute[2] originally adopted in 1915, and used them to encroach absolutely on a federally guaranteed means — fee-shifting — for securing federally guaranteed rights.

No change in the way Petitioners or like groups operate can possibly avoid the state court's categorical prohibition. As a result, some cases they could once have afforded to accept will be turned away. This is simple economics. The fee-shifting awards that Congress granted to certain prevailing parties will no longer be fully negotiable.

The consequences will be national. The public interest, volunteer and *pro bono* bars are put painfully on notice that, despite this court's emphatic and persistent constitutional view from *Button* to *Primus*, the states are once again free to set up ancient champerty laws against the First Amendment right "to petition the Government for a redress of grievances" and the facilitative goals of federal fee-shifting statutes.

This prospect, and the overhanging threat of professional condemnation, will inhibit cautious lawyers everywhere.

For these reasons, this is an important case that should be reviewed.

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[2] Because a state statute is involved, Petitioners, pursuant to Rule 29.4(c) of this Court's Rules, have stated by letter dated May 7, 1991, addressed to the Attorney General of the State of Missouri, that 28 U.S.C. § 2403(b) may be applicable. Enclosed with the letter were copies of the Petition and the Brief in Opposition.

2. The Constitutional Issue and the Applicability of *Button and Primus.*

Respondent refuses to come to grips with the applicability of *Button* and *Primus*. He argues that those cases involve solicitation, not fee sharing, and that the decision below is correct because it is in accord with *National Treasury Employees Union (NTEU) v. U.S. Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981), and cases like it. Both contentions are analytically flawed.

Respondent offers no explanation why a blanket ban on fee-sharing is less constitutionally suspect than a blanket ban on solicitation. Rules on solicitation and fee-sharing are inextricably intertwined. The *ratio decidendi* of *Primus* was that *precisely because* the fee award would go to the ACLU, the solicitation did not take on a commercial taint and enjoyed constitutional protection. *In re Primus*, 436 U.S. 412, 429-431 (1978). "[T]he entire arrangement," both the fee arrangement and the solicitation, employed constitutionally privileged means of expression to secure constitutionally guaranteed civil rights. *See NAACP v. Button*, 371 U.S. 415, 442 (1963), and the Petition at pp. 13-16.

This critical distinction between civil liberties litigation and commercial litigation was recognized by this Court in *Ohralik v. Ohio State Bar Ass'n.* 436 U.S. 447 (1978), decided the same day as *Primus*. Under *Primus*, civil liberties litigation and the fees it generates have constitutional protection; under *Ohralik*, commercial litigation does not.

Decisions such as *NTEU, supra,* and *Curran v. Department of the Treasury*, 805 F.2d 1406 (9th Cir. 1986), actually support Petitioners because they uphold the position that non-traditional sponsors of litigation can receive legal fees. Indeed, the ABA, under its own interpretation of the fee-sharing rule, tolerates a lay sponsor of a *for-profit* prepaid legal service plan to share legal

fees with participating lawyers. *ABA Formal Ethics Opinion 87-355* (December 14, 1987). Although *NTEU* imposes a modest restriction on the handling of court-awarded fees (a restriction "unprecedented in the arena of ethical standards" (*Curran, supra* at 1408 n.1)), it in no way supports the constitutional decision below, which upholds the total bar on fee-sharing found in Missouri's statute and court rule and erroneously rejects "the fair intendment" of *Button* and *Primus* (dissenting opinion of Chief Justice Blackmar, Petition, Appendix A-20).

3. The Statutory Preemption Issue

Respondent cites this Court's decision in *Clark v. Jeter*, 486 U.S. 456, 459 (1988), for the proposition that this Court "cannot" consider issues not pressed below (Brief in Opposition at p. 14). While the Court need not consider such an issue, most assuredly it can and has considered federal issues not pressed below where, as here, a constitutional question is properly presented and the case may be decided on a narrower federal statutory issue not raised below but which is a necessary element of the broader constitutional issue (*see* cases and authorities cited at page 18, footnote 7, of the Petition).

On the merits, Respondent's sole argument against preemption is that there is no congressional history indicating an intent to supersede a state's power to regulate fee sharing. Such an argument widely misses the mark. Here, state law is preempted because it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" when it enacted § 1988. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (ethical rule regarding court costs frustrates, and is therefore preempted by, Rule 23 of the Federal Rules of Civil Procedure); *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1407, 1415 (E.D.N.Y. 1989) ("[T]o the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement").

4. Respondent's Misstatement of the Case

This case *does not* turn on the particulars of how Petitioners' office operates, and the court below did not rely on such details in making its far-reaching decision. Nevertheless, some of the many argumentative, immaterial and incorrect facts alleged in Respondent's Brief in Opposition require an answer.

A good example of distortion is Respondent's red-herring statement that this case is "the culmination of an ongoing conflict. . .regarding the extent of lay control over the position of ACLU/EM staff counsel" (Brief in Opposition, p. 2). There was no such conflict in the courts below. Because there was no genuine issue of material fact, this matter was decided on cross-motions for summary judgment, and no judge deciding the case below ever stated that there was a conflict relating to lay control. Indeed, the record fails to show that Respondent ever complained of lay control or lay interference with the professional judgment that he exercised in the underlying litigation in federal court or in any other case in which he was involved. Nor could he since the Executive Director of Petitioners testified that she "never made a decision on pending litigation," never decided on the appropriate use of funds for litigation, and never negotiated any settlements (Armstrong Depo. pp. 43, 46). There simply is no question of lay interference presented by the facts of this case, and, as in other cases decided by this Court, it is not an issue here. *NAACP v. Button,* 371 U.S. 415, 441, 442-444 (1963) (lay interference not applicable); *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 223 (1967) (lay interference not applicable because only "a distant possibility").

Apparently relying on his own rambling, self-serving and mostly hearsay affidavit filed the day of the hearing in the Circuit Court (and, as observed by the dissenting opinion below, not usable under Missouri law to support Respondent's Motion for Summary Judgment (Petition, Appendix A-26)), Respondent

implies that the national ACLU and its affiliates, other than Petitioners, have separate litigation funds controlled solely by lawyers and usable only for litigation purposes (Brief in Opposition, pp. 8, 29). That suggestion is untrue. Like many other public interest organizations, the national ACLU's litigation fund is controlled by a board consisting of both lawyers and non-lawyers, and fund balances may be transferred into the general fund of the ACLU Foundation. Moreover, all of the 47 ACLU affiliates surveyed by Petitioners allow litigation proceeds to be controlled by lawyers and non-lawyers, and at least 33 of the affiliates may use the proceeds for general purposes. *Exhibits C and D to Petitioners' Supplemental Brief filed in the Supreme Court of Missouri.*[3]

Finally, the factual emptiness of Respondent's position is demonstrated by his continued reliance on the disingenuous contention that he, rather than his client, was awarded the fee judgment in this case (Brief in Opposition at p. 9). The undisputed documentary evidence in the record is that Respondent's *client* was awarded the judgment, as required by 42 U.S.C. § 1988 (fee to be awarded to the "prevailing party"). The courts below properly rejected Respondent's hollow argument to the contrary (based on an inadvertent, conclusory statement in one of Petitioners' pleadings), and properly found as an undisputed material fact that the fee awarded was entered in favor of the client, not Respondent (Petition, Appendix A-2, A-12, A-31). That unassailable fact was one of the reasons Chief Justice Blackmar was "shocked" by Respondent's "dishonorable conduct" of "help[ing] himself to the money" which belonged to Respondent's client and which the client had assigned to Petitioners. (Petition, Appendix A-12, A-13, A-16.)

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[3]This information was presented in the court below in accordance with the Brandeis brief concept. *See Muller v. Oregon*, 208 U.S. 412, 421 (1908). Respondent moved to strike the information, but the Supreme Court of Missouri ignored his request, and the data remain in the record.

Conclusion

For the reasons stated in the Petition and in this Reply, it is respectfully submitted that the Court should grant the petition for a writ of certiorari.

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